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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Case No 2021-CP-40-01788

Ricardo L. Middleton #381526, Petitioner,

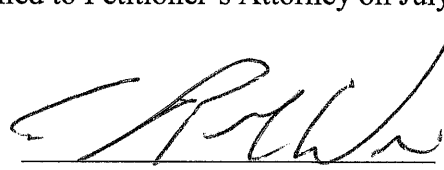
vs.

State of South Carolina, Respondent.

NOTICE OF INTENT TO APPEAL

Ricardo L. Middleton appeals the Order of the Honorable William A. McKinnon dated July 15, 2025 and filed July 18, 2025. This Order was mailed to Petitioner's Attorney on July 29, 2025.

August 11th, 2025



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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Ricardo L. Middleton, #381526

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTH JUDICIAL CIRCUIT

) CASE NO. 2021-CP-40-01788

**ORDER OF DISMISSAL
WITH PREJUDICE**

Presiding Judge:	Hon. William A. McKinnon
Applicant's Attorney:	C. Rauch Wise, Esq.
Respondent's Attorney:	Russell Barlow, Esq.
Trial Counsel:	Tivis C. Sutherland, IV, Esq.
Date of Hearing:	September 26, 2024
Court Reporter:	Maria DiScioscia

RICHLAND COUNTY
 FILED
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 FANETTE W. MCKINNON
 C.C.P. CLERK & S.

This matter comes before the Court by way of Ricardo L. Middleton's (Applicant) application for post-conviction relief (PCR) filed on April 16, 2021. Respondent, the State of South Carolina, filed its Return on July 27, 2021, requesting an evidentiary hearing to resolve the claims as set forth in the application.

On September 26, 2024, an evidentiary hearing was convened virtually over WebEx before the Honorable William A. McKinnon. Applicant was present and represented by C. Rauch Wise, Esquire. Senior Assistant Deputy Attorney General D. Russell Barlow, II, represented Respondent. At the hearing, Applicant proceeded forward on all but one of the claims set forth in his application. In support of his claims, Applicant testified on his own behalf and presented testimony from Marquez Johnson (Johnson). Respondent presented testimony from Tivis C. Sutherland, IV, Esquire (Trial Counsel), and Assistant Solicitor Lamar Fyall (Solicitor Fyall).

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismisses this action with prejudice.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. During the October 2017 term, the Richland County Grand Jury indicted Applicant for two counts of Murder (2017-GS-40-5854; -5855) and one count of Attempted Murder (2017-GS-40-5852). Applicant was represented by Trial Counsel. Fifth Circuit Assistant Solicitors Lamar J. Fyall, Jeremiah J. Shellenberg, and John W. Steadman prosecuted the case.

On August 19–22, 2019, Applicant's case proceeded to a jury trial before the Honorable L. Casey Manning. The jury convicted Applicant of the murder of Sydni Collins, not guilty of the attempted murder of Ricky Montgomery, and could not decide guilt as to the murder of Aaron Collins. His sentencing was deferred. On September 26, 2019, Judge Manning sentenced Applicant to serve life imprisonment.

On September 26, 2019, Applicant renewed his motion and objections from trial and made a Motion for a New Trial. On October 3, 2019, Applicant prematurely filed a notice of appeal. On November 13, 2019, Applicant moved to dismiss the appeal as premature, as Applicant's post-trial motions had not been disposed of. The South Carolina Court of Appeals granted Applicant's Motion to Dismiss the appeal as premature on January 3, 2020. The Remittitur was returned to the lower court on January 24, 2020. On February 21, 2020, Judge Manning denied Applicant's motion for a new trial.

Applicant filed a timely Notice of Appeal. On December 1, 2020, Applicant moved to withdraw his direct appeal through counsel, C. Rauch Wise, Esquire, so that he could proceed with a PCR action. On December 21, 2020, Applicant filed a signed affidavit stating he was advised of the pros and cons of continuing the appeal in his case, that based on discussions with counsel, he believed it was in his best interest to proceed with PCR, and that he understood that he would not be able to raise direct appeal issues on PCR. The Remittitur was returned to the lower court on January 27, 2021.

CURRENT ACTION BEFORE THIS COURT

On April 16, 2021, Applicant filed his PCR application alleging he was being held in custody unlawfully for the following reasons:

- (1) Ineffective Assistance of Counsel
 - (a) ~~Trial Counsel failed to properly prepare the cell phone tower information to establish that the applicant was not in the vicinity of the incident.~~¹
 - (b) Trial counsel failed to properly show to the jury that the automobile he was in that was shown on the video tape, at at [sic] a different time from the time of the shooting.
 - (c) Trial counsel failed to properly use the inconsistent statements previsouly [sic] given by the witnesses.
 - (d) Trial counsel did not meet with applicant in sufficient time to adequately prepare for trial.
 - (e) Trial Counsel called attention to the fact that the Defendant did not testify in his closing argument. During closing argument, trial counsel mentioned that in England the failure to testify is held against a defendant. (Page 490 of the transcript). This statement called to the jury's attention the fact the Applicant did not tetify [sic] and was prejudicial to the applicant.
 - (f) Trial Counsel failed to make a motion to prohibit the state from referring to the biker clubs as gangs and permitting a witness to refer to the gang of which Applicant was a member as an "outlaw" motorcycle club. During the trial the state made several references to the club to which the applicant belonged as a "gang" but did not sue the same word to describe the other club involved [sic] in this matter. Also, Ronie Scott was permitted [sic] to testify that the Applicant belonged to an "outlaw" gang.

¹ Applicant withdrew this allegation at his evidentiary hearing. (PCR Tr. p. 10).

- (g) Trial Counsel failed to object to the "hand of one is the hand of all" charge when there was no evidence Applicant and the co-defendant participated together in the alleged attack. Trial counsel did not object to "the hand of one is the hand of all" charge when there was no evidence the two shooters were working together. This is born out by the acquittal of Marquez Johnson. If the shooting had been planned, Mr. Johnson [sic] would not have been successful in his self-defense claim.
 - (h) Trial counsel failed to request a self-defense charge as the testimony supported [sic] such a charge. Trial counsel did not request a self defense [sic] charge. Under the facts of this case, the evidence establishes that one person killed, for whom the Applicant was convicted, has fired her weapon before she was shot and killed.
 - (i) Trial counsel improperly advised Applicant not to testify in his own defense. Applicant desired to testify in his own defense. Trial counsel improperly encouraged Applicant not to testify in his own defense.
 - (j) Trial counsel failed to object to the improper testimony of Taima Jordan when the witness testified statements given by the witnesses were consistent with the video. Trial counsel failed to object to hearsay testimony by the witness. Trial counsel failed to object to the opinion testimony of Taima Jordan that the statements of the witnesses were consistent with the video. This opinion testimony by the witness invaded the providence of the jury. Also, the witness had not been qualified as an expert in such comparisons.
 - (k) Trial counsel failed to object to the opinion testimony of Taima Jordan as the witness had not been qualified as an expert. Taima Jordan was permitted to testify during cross examination as to his opinion of motorcycle club culture when he had not been qualified as an expert. Trial counsel should have objected to the testimony and moved to strike it.
- (2) Newly Discovered Evidence
- (a) Since the trial of the case, Marquez Johson [sic], the co-defendant, has been tried and acquitted. His is now available as a witness who will aid the case for the applicant.

Before this Court are the Richland County Clerk of Court records from the underlying conviction and sentence, Applicant's records from SCDC, the trial transcript, the appellate records, and the records of this PCR action.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act² provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

- (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
- (2) That the court was without jurisdiction to impose sentence;
- (3) That the sentence exceeds the maximum authorized by law;
- (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
- (5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
- (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d

² S.C. Code Ann. §§ 17-27-10 *et seq.*

813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland v. Washington to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Id. at 687–88; accord Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable." (citation and internal quotation marks omitted)).

Regarding the deficiency prong of the Strickland analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986); cf. Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).

Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, make every effort "to eliminate the distorting effects of hindsight," and

"evaluate the conduct from counsel's perspective at the time" in light of then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Accordingly, counsel's performance will be considered deficient only when it was objectively incompetent under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To meet this burden, counsel's deficient performance must have prejudiced the applicant to such an extent, there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625; see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S. at 112.

The Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second-guessing counsel's trial tactics, and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective

assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel, and a claim of newly discovered evidence, through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court additionally heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to evaluate and scrutinize their credibility. See, e.g., State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) ("In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment."); Clemons v. Mississippi, 494 U.S. 738, 766 (1990) (Blackmun, J., concurring in part and dissenting in part) ("The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire.").

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. See Rule 71.1(e), SCRPC (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

Accordingly, set forth below are the relevant findings of facts and conclusions of law as required by § 17-27-80 of the South Carolina Code:

INITIAL FINDINGS

This Court finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant, he rendered adequate assistance and exercised reasonable professional judgment in his representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ALLEGATIONS

Allegation 1b: Trial counsel failed to present to the jury that the videotape of Applicant's automobile showed a different time from the time of the shooting.

Applicant alleges that Trial Counsel's representation was constitutionally ineffective for failing to present to the jury that the videotape of Applicant's automobile showed a different time

from the time of the shooting. Applicant failed to present any evidence, testimony, or legal authority regarding this allegation at the evidentiary hearing. "When a party provides no legal authority regarding a particular argument, the argument is abandoned, and the court will not address the merits of the issue." Palmer v. State, 427 S.C. 36, 47, 829 S.E.2d 255, 261 (Ct. App. 2019) (citing State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011)). Therefore, the Court deems this allegation abandoned.

Allegation 1c: Trial counsel failed to use the inconsistent statements given by the witnesses.

Applicant alleges that Trial Counsel's representation was constitutionally ineffective for failing to use the inconsistent statements previously given by the witnesses. This Court finds this allegation is without merit.

Trial

On direct examination, Natasha Coad (Coad) testified that she was with Sydni and Aaron Collins the night of the shooting at bike night, and Ricky Montgomery (Montgomery) was with her, as well. (Trial Tr. p. 206). Coad testified that there was an incident that had taken place, and they all left; Sydni and Aaron on one bike, Ricky Montgomery on his motorcycle, and she followed behind. (Trial Tr. p. 207). Coad testified that they stopped at the first stoplight, and two riders came up on the right of them, Applicant being one of them. (Trial Tr. pp. 208–10). Upon stopping at the second stoplight, Coad testified that a vehicle came up on their left side. (Trial Tr. p. 211). At that point, Coad testified Applicant got off his bike and started shooting at Aaron.³ (Trial Tr. p. 211). Coad testified that someone got out of the vehicle, pistol-whipped Montgomery, and

³ From the record, it is apparent that Coad had mixed up who was on the motorcycle and who exited the vehicle. This was brought out at trial and corrected that Applicant exited the vehicle and was not on a motorcycle.

Montgomery fell, and his bike fell on top of him. (Trial Tr. p. 211). The person who exited the vehicle then started shooting. (Trial Tr. p. 212).

On cross-examination, Trial Counsel impeached Coad with her previous statements to law enforcement on three different occasions. (Trial Tr. pp. 215–25).

PCR Evidentiary Hearing

On direct examination, Applicant testified that witness Coad provided an affidavit in a civil suit against him. (PCR Tr. pp. 37–38; App. Exhibit 1). Applicant testified that the testimony in the affidavit was completely different from Coad's testimony at trial, which would have been helpful at trial to impeach Coad during cross-examination. (PCR Tr. pp. 38–39). Applicant testified that his trial took place several months after the civil suit, during which the affidavit was provided. (PCR Tr. p. 39). Additionally, Applicant testified that there was testimony in his case about a run-in he had with Jayrell Johnson (Jayrell). (PCR Tr. p. 39). Applicant testified that on page three of Jayrell's affidavit, Jayrell stated that he and Applicant had a conversation, shook hands, and walked away. (PCR Tr. p. 40; App. Exhibit 4). Applicant testified that Jayrell's affidavit would have been helpful in the cross-examination of witnesses to show that there was no problem between him and Jayrell. (PCR Tr. p. 41).

On direct examination, Trial Counsel testified that he discussed Coad's inconsistent statements in his opening and closing arguments at trial. (PCR Tr. pp. 60–61).

On cross-examination, Trial Counsel agreed that the differences in the affidavit would have been helpful. (PCR Tr. p. 76). Trial Counsel testified he was not a party to the action involving Coad's affidavit and had nothing to do with that case. (PCR Tr. p. 85). Trial Counsel testified that the affidavit became a public record on April 22, 2020, and Applicant's trial was in August or September of 2019. (PCR Tr. p. 85). Trial Counsel testified that he would not have been privileged

to this affidavit before trial if it was not filed until April of 2020, and he stated it was "unsurprising that Natasha has another story." (PCR Tr. p. 85). Furthermore, Trial Counsel testified that his recollection was that something about the Applicant's interaction with Jayrell wasn't good, and that he had a negative impression of Jayrell. (PCR Tr. p. 80). Trial Counsel agreed that the affidavit would have been helpful to the defense. (PCR Tr. p. 80).

On direct examination, Solicitor Fyall testified that the State wanted Jayrell to testify, but they were unable to locate him and serve the subpoena. (PCR Tr. p. 93). Solicitor Fyall testified that Jayrell helped their case because it put Applicant at the bar the week before with a pattern of activity. (PCR Tr. p. 93). Solicitor Fyall testified that witness Ashley Hill also testified that Applicant was at the bar the week before. (PCR Tr. p. 93).

On cross-examination, Solicitor Fyall testified that he disagreed with PCR Counsel's assertion that Applicant and Johnson parted on "good terms," given what happened subsequently. (PCR Tr. p. 95). Solicitor Fyall testified that he agreed with the statement that they parted respecting each other's position. (PCR Tr. p. 95).

Findings

This Court finds the combination of the record and Trial Counsel's testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court additionally finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, 286 S.C. at 442, 334 S.E.2d at 814. Trial Counsel **credibly** testified that he used Coad's inconsistent statements to law enforcement to impeach her testimony at trial and

to attack her credibility in opening and closing arguments.⁴ Additionally, Trial Counsel credibly testified that he could not have used Coad's civil trial affidavit filed on April 22, 2020, to impeach Coad, as it was not publicly available until after the trial.⁵ Trial Counsel cannot be deemed deficient in failing to use an affidavit to impeach a witness where it was not available at the time of Applicant's trial.

Regarding Jayrell's affidavit, Trial Counsel testified that at the time of the trial, he remembered having a reason for not involving Jayrell. Notably, Applicant focused on page 3 of the affidavit, where Jayrell states that he and Johnson shook hands and then walked away; however, later in the statement, Jayrell mentions a confrontation between him and the same man he had shaken hands with earlier that week. See Applicant's Exh. 4 at p. 5. Although Trial Counsel could not independently recall why he did not use Jayrell's statements to challenge the testimony of other witnesses, it is clear from Solicitor Fyall's credible testimony, the record, and the affidavit that there was some animosity between Johnson and Jayrell. Importantly, Ashley Hill's testimony about the interaction between Johnson and Jayrell aligns with Jayrell's statement. (Trial Tr. pp. 188–89).

Moreover, Solicitor Fyall testified that they wanted Jayrell to testify, but were unable to locate him for service of a subpoena. This Court finds that even if Trial Counsel wanted to use Jayrell's statement, he would first have had to move the statement into evidence without any objections to authentication or hearsay. Assuming that Trial Counsel did get the statement in and

⁴ Trial Tr. pp. 104-108, 215-225, 495.

⁵ In her affidavit, Coad stated she witnessed a shooting, that one of the shooters exited the vehicle, the shooter pistol-whipped Montgomery, and Montgomery fell to the ground, and the motorcycle fell on top of him. (App. Exhibit 4). This is consistent with Coad's testimony at trial (Trial Tr. pp. 206–12). However, in her affidavit, she provided that the car door of the vehicle struck Montgomery's motorbike, causing it to fall. (App. Exhibit 4).

used it, this Court cannot find that the result of the trial would have been different but for the isolated portion of the statement Applicant wants this Court to focus on. Instead, this Court has read the statement in its entirety and finds that it would have likely been more problematic for Applicant than helpful. This Court cannot find Trial Counsel deficient for not using a statement that would not have come into evidence because the person who wrote it was not available for cross-examination on the statement. Nor can this Court find any prejudice flowing from the alleged deficient performance.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 1d: Trial Counsel failed to sufficiently meet with Applicant to prepare him for trial.

Applicant alleges that Trial Counsel's representation was constitutionally ineffective for failing to sufficiently meet with Applicant and prepare him for trial. This Court finds this allegation to be without merit.

An applicant who alleges his or her defense attorney was ineffective in failing to spend more time preparing or providing a copy of the discovery materials must demonstrate prejudice by showing what evidence could have been discovered or what other defenses could have been

pursued. Harris v. State, 377 S.C. 66, 75–76, 659 S.E.2d 140, 145–46 (2008) (citing Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998)), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836. Federal case law holds that there is no constitutional minimum number of meetings between attorneys and their clients to satisfy competency. Campbell v. Polk, 447 F.3d 270, 279 fn.2 (4th Cir. 2006) (no constitutional minimum number of meetings to satisfy competency); United States v. Olson, 846 F.2d 1103, 1108 (7th Cir. 1988) (reciting that there is no constitutional minimum number of meetings between attorney and client and observing that an experienced attorney may get more out of a single meeting than a neophyte).

"Brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980) (holding it is not enough to merely show that counsel only met with his client twice before trial as long as counsel devoted sufficient time to insure an adequate defense and to become thoroughly familiar with the facts of the case and the law applicable to the case, and holding the record revealed that counsel was so prepared.). South Carolina case law has established that even if Counsel only met with his client very briefly, that alone does not establish that he was unprepared or ineffective at trial. See Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (citing Easter) (finding "Even if the meetings were brief, this fact alone is not indicative of inadequate trial preparation."), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

Additionally, "brevity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (2012). Applicant must show evidence indicating "how additional preparation or communication would have resulted in a different outcome." Id.; see Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (where application failed to show ineffective assistance of counsel based on lack

of preparation by neglecting to show evidence of what counsel failed to discover or what defenses counsel could have pursued had he more fully prepared for the case); Skeen v. State, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997) (where applicant failed to show ineffective assistance of counsel when he did not present evidence showing how additional preparation would have impacted the trial).

PCR Evidentiary Hearing

On direct examination, Applicant testified that he and Trial Counsel never discussed any trial strategy because Trial Counsel stated that the burden was on the State to prove the Applicant was there. (PCR Tr. p. 32). Applicant testified that he told Trial Counsel he wanted to pursue self-defense, and Trial Counsel didn't think it was a good idea. (PCR Tr. p. 33). Applicant testified that Trial Counsel did not prepare him for trial and that he wrote the court clerk multiple times that he never received his discovery. (PCR Tr. p. 37). Applicant testified that he and Trial Counsel didn't discuss anything in particular, and Trial Counsel focused solely on the burden of proof they had to establish. (PCR Tr. p. 37).

On direct examination, Trial Counsel testified that he was fairly certain he had reviewed all the discovery with Applicant and that he remembered watching all the body cameras with him. (PCR Tr. p. 56). Trial Counsel testified he recalled Applicant telling him he was not there when the shooting happened, and it was a misidentification, and that was the defense at trial. (PCR Tr. p. 57). Trial Counsel testified that he and Applicant "met a good bit," but he could not say the exact number of times. (PCR Tr. pp. 58–59). Trial Counsel testified he was prepared for this case. (PCR Tr. pp. 59–60). Trial Counsel testified he did not prepare Applicant to testify. (PCR Tr. p. 82). Trial Counsel testified he did not believe Applicant was at the crime scene until Applicant's testimony at this PCR hearing. (PCR Tr. p. 82). Trial Counsel testified that he talked to Applicant

about how Applicant was not there and that the witnesses were lying. (PCR Tr. pp. 82–83). Trial Counsel testified that he never discussed with Applicant what Applicant would say if he took the stand, because there would not be anything to add except that he was not there. (PCR Tr. p. 84).

Findings

This Court finds the combination of the record and Trial Counsel's testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court additionally finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, 286 S.C. at 442, 334 S.E.2d at 814. As an initial matter, this Court finds Trial Counsel's testimony **credible** on this issue and Applicant's testimony **not credible**. Trial Counsel **credibly** testified that he did not specifically recall the number of meetings, but that he and Applicant went over discovery, watched the body cam footage, and discussed trial strategy. Trial Counsel **credibly** testified that Applicant never told Trial Counsel he was at the scene of the shooting and shot the victim in self-defense.

Further, Applicant failed to provide how more time spent in consultation and preparation would have resulted in a different outcome. Applicant testified that had Trial Counsel spent more time with him in preparation, he would have pursued self-defense and been prepared to testify to the events that took place. However, as found *supra*, Applicant's testimony that he advised Trial Counsel he acted in self-defense is **not credible**. Moreover, contrary to Applicant's assertion, the facts do not support the existence of self-defense (discussed in detail *infra*, **Allegation 1h**). Based on this, Trial Counsel advised Applicant not to testify, as his testimony would not have added to his defense, and therefore, did not prepare him to testify. Notably, the trial court conducted a

thorough colloquy with Applicant concerning his right to testify, and at no point did he indicate that he wished to testify or that he was coerced into not doing so. (Trial Tr. pp. 463–66).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 1e: Trial Counsel called attention to the fact that Applicant did not testify.

Applicant alleges that Trial Counsel's representation was constitutionally ineffective for calling attention to the fact that Applicant did not testify. This Court finds this allegation to be without merit.

Trial

In closing, Trial Counsel stated the following:

You'll hear a jury instruction: you don't take it against him that he doesn't testify. Anybody who's seen -- and speaking of TV, one thing that is like TV, you do have the right to remain silent. You do not have to talk to police officers, and you'll receive an instruction on that. And speaking of our system being the worst except for all the others, in the United Kingdom, the country that we had the revolution from and broke away from, if you remain silent, they hold it against you in court.

(Trial Tr. pp. 489–490).

PCR Evidentiary Hearing

On cross-examination, the following colloquy occurred with Trial Counsel:

- Q. You think it was a good idea to call the attention to the jury that: In England you hold it against people that don't testify?
- A. I think -- and look, sometimes I go through more amendments depending on the circumstances. But I think the distinction between us and the rest of the world. 'Cause I saw it, it's a Winston Churchill quote. "We've got the worst judicial system in the world, except for all the others." I think and this is just my view, the distinction between the way we treat each other and the way other countries treat each other, is a good thing. Like it's an elevated thing. Basically, I'm doing a scrutiny argument on the government's case and it's sort of a why. It could have been a bad idea. That's not the first time, I can tell you that.
- Q. Okay. You thought it was an appropriate thing to do to tell the jury that: In some countries you hold it against the defendant if they don't testify?
- A. Yes, sir. They got a jury instruction on it.

(PCR Tr. pp. 81–82).

Findings

This Court finds Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." *Ard v. Catoe*, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Trial Counsel **credibly** testified that he strategically presented this argument to distinguish the justice system in the United States as better than the justice systems of other countries. Considering Trial Counsel's comment in closing at face value, Trial Counsel merely made reference to the following jury instruction given to the jury:

I instruct you and emphasize that the fact that the defendant did not testify is not a factor to be considered by you in any way in your deliberations and in your consideration of the question of the guilt or the innocence of the defendant. It must not be considered by you in any manner whatsoever. A defendant has the constitutional right to remain silent, and the assertion of that right, of this right must

not be considered by you in your deliberations. I repeat. Under your oath, you are to draw no conclusions whatsoever from the fact that the defendant in this case did not testify. The fact that the defendant did not testify should not even be discussed in the jury room. The burden of proof, as I have stated to you, is on the state. The defendant is not required to prove his innocence. The burden of proof remains on the state to prove guilt beyond a reasonable doubt.

(Trial Tr. p. 508). The trial court's standard jury instruction emphasized the right of Applicant to remain silent to the jury, and Trial Counsel preemptively explained this to the jury to paint Applicant's decision not to testify in the best light possible. See U.S. Const. Amend. V; S.C. Const. Art. I, § 12. Applicant misconstrues the context of Trial Counsel's comments in an effort to obtain relief where Trial Counsel acted in his best interest—explaining in a simplistic manner the rights afforded to Applicant under the constitution to the jury. While this Court may not agree that it was the best way of doing so, this Court cannot find Trial Counsel's action deficient under Strickland, nor can this Court find any prejudice flowing from the alleged deficiency.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 1f: Trial Counsel failed to make a motion to prohibit references to the biker clubs as "gangs."

Applicant alleges that Trial Counsel's representation was constitutionally ineffective for failing to make a motion to prohibit references to the motorcycle clubs as "gangs." This Court finds this allegation to be without merit.

An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence). Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691.

The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation." United States v. Nguyen, 379 F. App'x 177, 181 (3d Cir. 2010); see Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland."); cf. Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot.).

When analyzing counsel's performance, the reviewing court will "strong[ly] presume[e] that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. Yarborough, 540 U.S. at 8 (internal quotation marks omitted); cf. Higgs v. United States, 711 F. Supp. 2d 479, 515 (D. Md. 2010) ("Defense counsel constantly must decide what questions to ask and how much time to spend on a particular witness. These are precisely the types of tactical decisions a court is not supposed to second guess.") (citing Byram v. Ozmint, 339 F.3d 203, 209 (4th Cir. 2003)); Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (Strickland standard was not developed "to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.").

In general, character evidence is not admissible to prove that a defendant acted "in conformity therewith on a particular occasion." Rule 404(a), SCRE. However, such evidence can be admissible if there is a legitimate purpose that proves "motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE.

If . . . the trial court concludes the prior bad act evidence serves some purpose other than to show the defendant's proclivity for criminal conduct . . . then the evidence is admissible unless its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Johnson v. State, 433 S.C. 550, 556, 860 S.E.2d 696, 699 (2021) (citing Rule 403, SCRE). "Logically relevant gang evidence" can be admitted to prove motive and intent. Johnson v. State, 433 S.C. at 557 ("The trial court was well within its discretion in finding this evidence was logically relevant to prove criminal conspiracy and accessory before the fact of murder."); See Armstrong v. State, 310 Ga. 598, 852 S.E.2d 824 (2020) ("As we concluded in Worthen, here 'the prosecutorial need for the other acts evidence showing gang membership was high' because,

without it, it is unclear what motive Armstrong would have had to shoot Parrish in a crowded park merely because Parrish was in a dispute with Worthen."").

PCR Evidentiary Hearing

On cross-examination, Johnson testified that he was involved in a motorcycle club called the Thunderguard Motorcycle Club. (PCR Tr. p. 20). Johnson testified he was permitted to be in a motorcycle club and the military at the same time, but not this particular club, which was a "One Percent club." (PCR Tr. pp. 20–21).

On direct examination, Applicant testified he was in a motorcycle club with Johnson called the Thunderguards. (PCR Tr. p. 28). Applicant testified that Montgomery and AC Collins were in the motorcycle club called "Outcast." (PCR Tr. p. 28). Applicant testified there were numerous references to "gangs" at trial. (PCR Tr. p. 34). Applicant testified that the Thunderguards and Outcast were clubs. (PCR Tr. p. 34). Applicant testified that the motorcycle clubs have charity events, free giveaways with children, free haircuts, and a lot of things that can be looked up with the mayor. (PCR Tr. p. 34). Applicant testified he thinks the numerous references to him being in a motorcycle gang absolutely hurt his defense because it painted him as a bad person. (PCR Tr. p. 34). When asked if this shooting was in any way a gang related shooting, Applicant testified, "Not at all. We didn't even – they didn't know me and I didn't know them. I didn't find out until later what the initial problem was over." (PCR Tr. p. 42).

On cross-examination, Applicant testified the word "gang" was used all through his trial. (PCR Tr. p. 49). Applicant testified it wouldn't surprise him that the word "gang" was used only 14 times, and only 9 of those times referred to the "biker gang." (PCR Tr. p. 49). Applicant testified that a "club" and a "gang" are two different things. (PCR Tr. p. 49). When asked to explain the difference, Applicant testified, "A 'club' is something like a 'country club' and a 'gang

bar,' is a 'gang bar.' And you will pick and choose which one you go to." (PCR Tr. p. 50). Applicant testified that, upon reviewing the entire situation, he was there without family because his attorney had advised them not to attend, which led the jury to conclude that he was unloved and associated with a biker gang. (PCR Tr. pp. 50–51).

This Court *sua sponte* questioned Applicant, as follows:

- Q. Sir, you've testified that there's a difference between a motorcycle club and a motorcycle gang. But I heard the previous witness describe the Thunderguards as a "One Percent Club", what does that mean?
- A. A 99 and 1 percent -- for me -- a "One Percent" for me, it equals more girls. Girls like the One Percent, that's what it was.
- Q. Isn't there a reference to One Percent as outlawed bikers from that quote from the 1960s?
- A. Yeah, but it's not like that no more. But if that's the case, Outcast, which was the Collins is also One Percent. So One Percent, One Percent.

(PCR Tr. pp. 52–53).

On direct examination, Trial Counsel testified that his idea with the term "gang" being used was that there was an "elephant in the room," but he thinks he should have objected to that because it was a "close case." (PCR Tr. p. 62).

On cross-examination, Trial Counsel agreed that there was a big difference between referring to a group of people as a "motorcycle gang" and "motorcycle club." (PCR Tr. p. 69). Trial Counsel acknowledged he would prefer for this to be a motorcycle club. (PCR Tr. p. 69). Trial Counsel testified he thinks it was a mistake in retrospect for him to say "biker gang" in his opening statement. (PCR Tr. p. 70). Trial Counsel testified he should have objected several times when people referred to the "gang unit" investigating this case. (PCR Tr. p. 70). Trial Counsel agreed it would have been best to leave the word "gang" out. (PCR Tr. p. 70). Trial Counsel testified that no expert on "gang activity" testified in this case. (PCR Tr. p. 77). Trial Counsel

testified that whenever the witnesses wanted to explain their differing stories, they would fall back on the "One Percent" concept. (PCR Tr. p. 78).

On redirect examination, Trial Counsel again testified that he decided to talk about the gang issue because it was the "elephant in the room." (PCR Tr. pp. 87–88).

On direct examination, Solicitor Fyall testified that a motion or hearing concerning the use of the term "gang" was not pursued because they decided themselves not to overuse it. (PCR Tr. p. 92). Solicitor Fyall testified that they didn't think it was a problem to say "gang" because that was part of the motivation for the shooting, but they just decided not to overdo it. (PCR Tr. p. 92).

During cross-examination, Solicitor Fyall testified that the State made a conscious decision not to overemphasize the term "gang." (PCR Tr. p. 100). Solicitor Fyall testified that generally bringing up gang testimony is prejudicial; however, it was the State's theory that the whole motive for the shooting was gang-related. (PCR Tr. p. 101). Solicitor Fyall testified that had there been an argument concerning suppressing the term "gang," it likely would not have been suppressed. (PCR Tr. p. 100). Solicitor Fyall testified that he believed they did not argue about the use of the term gang pre-trial because of that, but the State decided not to overuse the term, regardless. (PCR Tr. p. 100).

Findings

As an initial matter, this Court finds Trial Counsel's self-assertions that he should have moved to suppress any reference to gangs and not mentioned it in his opening statement does not automatically determine that Trial Counsel was ineffective. Dows v. Wood, 211 F.3d 480 (9th Cir. 2000) (Counsel's self-serving statement need not be accepted as true.); United States v. Eyman, 313 F.3d 741 (2d Cir. 2002) ("It is the magnitude of those errors that is determinative; trial counsel's admission that his performance was deficient is not dispositive."). Additionally,

counsel's performance is not assessed with the advantage of hindsight, but what they believed was correct at the time. See Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996) (declining "to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial").

This Court finds Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, 286 S.C. at 442, 334 S.E.2d at 814. Trial Counsel testified that he decided to talk about the gang issue because it was the "elephant in the room." Solicitor Fyall **credibly** testified that the State's theory was that the shooting was motivated by a dispute between the motorcycle gangs. Solicitor Fyall **credibly** testified that he believed that had there been a motion to suppress reference to gangs, the trial court would have likely ruled it was admissible, as the probative value of the testimony substantially outweighed its prejudicial effect. See Johnson, *supra*, citing State v. Lyle, 125 S.C. 406, 417, 118 S.E. 803, 807 (1923) ("If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime."); See also Armstrong, *supra* (prosecutorial need for other acts evidence of gang membership was high because of unclear motive).

Therefore, Trial Counsel is not deficient for failing to move to suppress reference to gangs, as the motion likely would not have been successful, as gang testimony was necessary to prove motive to an otherwise inexplicable and random shooting. See Miller v. Keeney, 882 F.2d 1428,

1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Additionally, as noted by Respondent, the word "club" was used in reference to the motorcycle gang one hundred forty-seven (147) times, while there were fourteen (14) instances of the word "gang," only nine of which were used to refer to the "biker gang." This corroborates Solicitor Fyall's testimony that a conscious decision was made to limit the prejudicial effect of the necessary testimony concerning gang affiliation.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 1g: Trial Counsel failed to object to the "hand of one is the hand of all" charge when there was no evidence that the two shooters were working together due to the acquittal of Marquez Johnson.

Applicant alleges that Trial Counsel's representation was constitutionally ineffective for failing to object to the "Hand of One, Hand of All" charge. Specifically, Applicant argued this

allegation is supported by the acquittal of Johnson, Applicant's co-defendant. This Court finds this allegation to be without merit.

An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence). Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691.

The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation." United States v. Nguyen, 379 F. App'x 177, 181 (3d Cir. 2010); see Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland."); cf. Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot.).

When analyzing counsel's performance, the reviewing court will "strong[ly] presume[e] that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than

sheer neglect. Yarborough, 540 U.S. at 8 (internal quotation marks omitted); cf. Higgs v. United States, 711 F. Supp. 2d 479, 515 (D. Md. 2010) ("Defense counsel constantly must decide what questions to ask and how much time to spend on a particular witness. These are precisely the types of tactical decisions a court is not supposed to second guess.") (citing Byram v. Ozmint, 339 F.3d 203, 209 (4th Cir. 2003)); Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (Strickland standard was not developed "to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.").

To avoid a finding of ineffectiveness, and where counsel articulates a strategy, counsel must also articulate a valid reason for employing a particular strategy. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). Thereafter, that strategy is measured under an objective standard of reasonableness. Id.; see also Stacy v. Solem, 801 F.2d 1048, 1051 (8th Cir. 1986) (finding that "labeling counsel's actions as "trial strategy" does not automatically immunize an attorney's performance from sixth amendment challenges."). When counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010).

"Under [the hand of one, the hand of all] theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999). It does not matter whether a co-defendant or co-defendants were acquitted in separate trials; what matters is what evidence was presented at the defendant's trial regarding whether accomplice liability applies. See Butler v. State, 435 S.C. 96, 866 S.E.2d 347 (2021).

PCR Evidentiary Hearing

On direct examination, Applicant testified he did not recall any evidence in his trial that the shooting was "Hand of One, Hand of All." (PCR Tr. p. 35). Applicant testified that the jury came back with a question about "Hand of One, Hand of All," and the trial judge defined it for them again. (PCR Tr. p. 36).

On cross-examination, Applicant testified "Hand of One, Hand of All" was used for both Sydni Collins and AC Collins' murders. (PCR Tr. p. 51). Applicant testified he received a mistrial on AC Collins and was found "not guilty" on the Ricky Montgomery attempted murder charge. (PCR Tr. pp. 51–52).

On direct examination, the following colloquy occurred with Trial Counsel:

Q. Let's see, there's an allegation of, Hand of One is the Hand of All. How did you go about handling that?

A. Well again, you got people riding up on either side and one person -- and again, the standard is "any evidence" for it. So it didn't really make sense to really try to fight that thing. Ultimately, I tried to preserve -- a lot of folks would just argue every little thing and fight every little thing. I tried to preserved fighting for things that are legit. You have more credibility that way with judges. With my pretrials typically, instead of a day, maybe half a day. But it's legit -- I think just being straight forward is the best way to go. So it did not occur to me to try to get up there and try to argue against that under the facts and circumstances of this case.

(PCR Tr. pp. 62–63).

On cross-examination, Trial Counsel testified that the evidence to support "Hand of One, Hand of All" was that people were riding up on the left and the right, and a shooting in the middle. (PCR Tr. pp. 70–71). Trial Counsel testified that he did not remember hearing any testimony of "preplanning" with Johnson. (PCR Tr. p. 71). Trial Counsel testified that if there were any evidence, even circumstantial evidence, the jury would get the charge. (PCR Tr. p. 71). Trial Counsel testified that witnesses talked about being ambushed, although he did not believe what

they said. (PCR Tr. pp. 71–72). Trial Counsel testified that there was video evidence of them coming up on both sides, with a truck creeping up in the back, and that he did not see the point of objecting to a "Hand of One" charge under those circumstances. (PCR Tr. p. 72).

In response to the point about a judge acquitting Johnson, Trial Counsel responded that he did not think Coad testified at that proceeding. (PCR Tr. p. 72).

On direct examination, Solicitor Fyall testified to the following:

Based on the evidence and the testimony, even prior to the testimony, it was our theory that Ricardo Middleton struck Ricky Montgomery, shot Sydni Collins, and that Marquez Johnson, as a part of that planned attack, shot Aaron Collins or AC. The Hand of One, Hand of All theory, as it relates to Mr. Middleton, was only as to Aaron Collins, because the forensic evidence was very clear that Marquez Johnson had shot him -- the forensics evidence. And also very clear that Ricardo Middleton had shot Sydni Collins.

(PCR Tr. p. 90).

Additionally, Solicitor Fyall also testified to the following:

- Q. What was the distinction between the Middleton case and the Johnson case?
- A. The biggest distinction was that the case against Johnson was, I would say was purely circumstantial. All of the witnesses testified that the shooting started and they, sort of, ducked down. Before that happened, most of the witnesses were able to identify Ricardo Middleton at the scene. You can see at least a portion of his actions. Nobody was there when we testified to what Marquez Johnson had done. It was obvious to us that he had shot Aaron Collins. We found the gun in his yard that shot Aaron Collins and that gun matched the shell casings at the scene and the bullets that had shot Aaron Collins. But nobody was able to testify as to what he did until after all the shooting was done. So Ronnie Scott was able to say: After the shooting, he got in my car. He was shaken up. He went back to get his bike. But no one was able to testify to his actions prior to the first shot, except him. And that only occurred for the first time at a Stand Your Ground Hearing.

(PCR Tr. p. 91).

On cross-examination, Solicitor Fyall testified that although the jury was not told "Hand of One, Hand of All" only applied to AC Collins, it was clear to Solicitor Fyall that they "got it."

(PCR Tr. p. 97). Solicitor Fyall testified that there was not only circumstantial evidence, but also Ronnie Scott's testimony about the text and the surveillance video of them talking in the parking lot before leaving. (PCR Tr. pp. 97–98).

Findings

This Court finds Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, 286 S.C. at 442, 334 S.E.2d at 814. This Court finds Trial Counsel **credibly** testified that he saw no reason to object where there was evidence for the charge of "Hand of One, Hand of All." See Butler v. State, 435 S.C. 96, 97-98, 866 S.E.2d 347, 348 (2021) ("Under the theory the 'hand of one is the hand of all,' when two people join together to commit a crime, and during the commission of that crime one of the two commits another crime, both may be criminally liable for the unplanned crime if it was a natural and probable consequence of their common plan to commit the initial crime.").

The record and Solicitor Fyall's **credible** testimony establish that evidence was presented that Applicant and Johnson orchestrated this shooting, presenting testimony from various witnesses—including Coad—that they pulled up on either side of the victims and started shooting after a gang-related dispute. Regardless, as Solicitor Fyall testified, the "Hand of One, Hand of All" theory applied to the shooting and killing of AC Collins, and Applicant was not found guilty of his killing. Therefore, there was no legal basis to object to the "Hand of One, Hand of All"

charge, and Applicant cannot establish that Trial Counsel was deficient or any resulting prejudice.⁶ See Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Furthermore, this Court finds that the acquittal of Johnson is not dispositive to the conviction of Applicant. In Butler v. State, the South Carolina Supreme Court held that the validity of Butler's conviction based on the theory of "the hand of one is the hand of all" and a subsequent acquittal of his co-defendant in a later trial was irrelevant to Butler's conviction. 435 S.C. at 98, 866 S.E.2d at 348–349. The Butler Court further held that it was unnecessary to consider the reasons that his co-defendant was acquitted, and that Butler's guilt was based on the evidence presented and proven at his trial. 435 S.C. at 98, 866 S.E.2d at 349, fn. 2. Here, there was sufficient evidence presented at Applicant's trial to submit to a jury the charge of accomplice liability. Thus, what happened in a later proceeding of Applicant's co-defendant is irrelevant to Applicant's conviction. See Butler v. State, 435 S.C. 96, 866 S.E.2d 347 (2021).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

⁶ Notably, while Trial Counsel did not object directly to the charge, he did attempt to argue a lack of evidence for "Hand of One, Hand of All" to the trial court in his motion for a directed verdict, and the trial court rejected his argument and denied his motion. (Trial Tr. pp. 461–462).

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**

Allegation 1h: Trial Counsel failed to request a self-defense charge.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to request a self-defense charge. This Court finds this allegation is without merit.

A defendant must establish four things in asserting self-defense:

- (1) First, the defendant must be without fault in bringing on the difficulty.
- (2) Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger.
- (3) Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and
- (4) Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984) (providing suggested self-defense jury instructions where the case calls for a self-defense charge).

PCR Evidentiary Hearing

On direct examination, Johnson testified that he and Applicant never had any plans together to pursue the people who surrounded Johnson in the parking lot. (PCR Tr. p. 15). Johnson testified there was no plan amongst anyone to cause any problems with AC Collins. (PCR Tr. p. 16). Johnson testified that he was in a conversation with AC Collins because he wanted them to pull over and talk. (PCR Tr. p. 17). Johnson testified that it seemed like AC Collins was getting aggravated, so he put his bike in neutral and put his hand in his vest. (PCR Tr. p. 17). Johnson

testified that it was when Sydney Collins got off the bike and raised her hand, so Johnson ducked and heard shots. (PCR Tr. p. 17). Johnson testified that when he looked up, he saw Sydney Collins on the ground. (PCR Tr. p. 17). Johnson testified that there was no contact between him and AC Collins before the shooting started, and that AC Collins had not reached over towards him or anything like that. (PCR Tr. p. 18). Johnson testified he had a hearing before the Honorable G. Thomas Cooper and was exonerated as a result of that hearing. (PCR Tr. pp. 18–19).

On cross-examination, Johnson testified that he did not see anything in Sydney Collins' hand or arm at the time when she raised it before the shooting started. (PCR Tr. pp. 21–22).

On direct examination, Applicant testified he was at the Bike Night at My House when he got a text and someone was in trouble, "so we all went." (PCR Tr. p. 25). Applicant testified that by the time he arrived, everybody was leaving, so he walked out and saw Johnson. (PCR Tr. p. 25). Applicant testified that he asked Johnson what happened, and Johnson briefly told him he got surrounded, "but it was nothing." (PCR Tr. p. 25). Applicant testified that Johnson was familiar with the club with which he had a run-in, but initially did not know the individuals. (PCR Tr. p. 25). Applicant testified that he left Bike Night, but due to heavy traffic, he turned around. (PCR Tr. pp. 25–26). Applicant testified he did not want to sit in traffic, so he went around in the turning lane, and then he saw what was going on with Johnson. (PCR Tr. p. 26). Applicant testified that he was driving his Toyota Yaris, which was his work vehicle. (PCR Tr. p. 26). Applicant testified that he and Johnson never discussed anything about going after the people with whom he had a run-in. (PCR Tr. p. 26).

Applicant testified that by the time he pulled up to the intersection, they "already had something going on." (PCR Tr. pp. 26–27). Applicant testified that he pulled up, looked to the right, "and it looked like they was wrestling or something." (PCR Tr. p. 27). Applicant testified

they definitely appeared to be agitated. (PCR Tr. p. 27). Applicant testified he was sitting there for a minute, but then he saw Montgomery get up, so he got out of his car and went over to him. (PCR Tr. pp. 27–28, 29). Applicant testified that Montgomery and AC Collins were in the Outcast motorcycle club, and that Applicant and Johnson were in the Thunderguards. (PCR Tr. p. 28). Applicant testified his purpose in going over to Montgomery was "to ask him to go over here so we can stop this from happening, because they were about to fight and I didn't want them to fight." (PCR Tr. p. 28).

The Court *sua sponte* questioned Applicant concerning his version of the events of the shooting. (PCR Tr. pp. 28–30). Applicant testified that when he got to the traffic light, Johnson and "the deceased" were "going at it," like "wrestling." (PCR Tr. p. 29). Applicant testified that when he saw Montgomery getting up, he said, "Listen, let's go over there and stop this." (PCR Tr. p. 29). In response to this Court asking whether there was physical contact between them that Applicant saw from his car, Applicant testified, "Yeah. Like they was arguing, like going back and forth. And that's what he kind of testified too, like, he was going back and forth." (PCR Tr. p. 29).

Applicant testified that Montgomery told Applicant to get away from him and pulled out a gun, and Applicant was surprised, so Applicant punched him in the face, and he fell. (PCR Tr. p. 30). Applicant testified that at that time, the "female" was off the bike and shooting, and he shot back. (PCR Tr. pp. 30–31). Applicant testified that after the shooting, he got in his car and left. (PCR Tr. p. 32). Applicant testified that he discussed self-defense with Trial Counsel, and Trial Counsel told him, "Let them prove it." (PCR Tr. p. 33). Applicant testified that he stated he wanted to assert self-defense, and Trial Counsel said no, stating that he did not see it as a good idea. (PCR Tr. p. 33). Applicant testified that he discussed what happened that night with Trial

Counsel, which was the same as what he was saying at this PCR hearing. (PCR Tr. p. 34). When asked if he would have pulled a gun out and fired if Sydney Collins had not pulled a gun out, Applicant responded, "Not at all. Not at all." (PCR Tr. p. 42). Applicant testified that he "absolutely" felt that a self-defense charge would have helped him. (PCR Tr. p. 42).

On cross-examination, Applicant testified that he got out of his car at a red light due to the altercation. (PCR Tr. p. 46). Applicant testified he was carrying a gun with him. (PCR Tr. p. 46). Applicant testified that the situation involved him because "if they're my friends, I'm trying to stop them." (PCR Tr. p. 46). Applicant testified that he did not have a gun in his hand when he got out of his car and hit Montgomery. (PCR Tr. p. 47). Applicant testified that Sydney Collins shot a few times because "her gun was jammed," and said it would surprise him that there was only one shot fired from her gun. (PCR Tr. p. 47). Applicant testified that Sydney Collins was shooting at him, and he shot back. (PCR Tr. p. 48).

On direct examination, Trial Counsel testified that he recollected that his discussions with Applicant were that Applicant was not at the shooting, and it was a misidentification. (PCR Tr. p. 57). Trial Counsel testified that there was no discussion concerning self-defense that he remembered. (PCR Tr. p. 57).

The Court *sua sponte* questioned Trial Counsel whether Applicant ever advised Trial Counsel that he was at the scene or that he shot the victim in self-defense. (Trial Tr. p. 60). Trial Counsel testified Applicant never told him he was at the scene of the shooting, nor that he shot the victim in self-defense. (PCR Tr. p. 60).

On cross-examination, Trial Counsel testified that he did not believe or know that Applicant was at the scene of the shooting until he heard Applicant's testimony at the PCR hearing. (PCR Tr. p. 66). Trial Counsel testified that the government had to prove Applicant was there, so

his defense did not require him to know precisely where Applicant was at every moment; he just was not at the shooting when it happened. (PCR Tr. p. 68). Trial Counsel testified there was evidence that Sydney Collins discharged her firearm, and that he argued the medical testimony showed she would not have had much time to shoot after she was shot. (PCR Tr. pp. 73–74). When asked if Applicant would have a plausible self-defense charge with evidence that Sydney Collins fired first, Trial Counsel stated, "You can say that. It's just, my argument was: It wasn't him, he wasn't there." (PCR Tr. pp. 74–75).

Trial Counsel reiterated that this PCR hearing was the first time he had heard that the Applicant was present at the shooting. (PCR Tr. p. 82). Trial Counsel testified that "everything is my guy's decision." (PCR Tr. p. 82). Trial Counsel testified that he did not believe Applicant was present and that he had discussed the trial with the Applicant. (PCR Tr. p. 83). Trial Counsel testified that he did not discuss what Applicant would say if he took the stand, because if Applicant was not present at the shooting, he could not add anything. (PCR Tr. p. 84).

Furthermore, Trial Counsel testified that there was a significant amount of "cell tower" testimony in this case and stated that he did not believe the cell tower testimony proved anything. (PCR Tr. p. 64). Trial Counsel testified Applicant told him he was "over there partying" at Bike Night the night of the shooting, which is consistent with the cell tower information placing Applicant in the area. (PCR Tr. p. 66). Trial Counsel testified that his argument at trial was that Applicant was clearly at Bike Night, but he's not a murderer. (PCR Tr. p. 65). Trial Counsel testified he did not have any written notes of his interview with Applicant, where Applicant stated where he was at the time of the shooting. (PCR Tr. p. 67). Trial Counsel agreed it was essential to know where Applicant was at the time of the shooting if the defense strategy was that he was

not there, but that it was also crucial that they could not prove he was at the shooting. (PCR Tr. p. 67).

Findings

As an initial matter, this Court finds Trial Counsel's testimony credible on this issue and Applicant's testimony not credible. Trial Counsel credibly testified that Applicant did not tell him he was present at the shooting or that he shot in self-defense. Trial Counsel credibly testified that the first time he heard about Applicant acting in self-defense was at the PCR hearing before this Court. Therefore, Trial Counsel is not deficient for failing to request a charge on self-defense, as Applicant never advised Trial Counsel that he was present at the scene or acted in self-defense. See Strickland, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.").

Further, this Court finds Applicant's testimony concerning the events giving rise to the shooting and killing of the victims not credible:

First, Johnson's and Applicant's testimony are in conflict. Johnson testified that there was no altercation with AC Collins prior to the shooting, while Applicant testified that he saw Johnson and AC Collins wrestling, and that is why he got involved. At Johnson's Stand Your Ground hearing, Johnson testified that AC Collins lunged at him *after* he heard a volley of shots fired, and that he shot AC Collins when he lunged at him. (App. Exhibit 7). Johnson did not testify to any wrestling match between him and AC Collins before the Applicant shot Sydney, nor was there any testimony that Johnson was afraid for his life.

Second, Deputy Alexander Laird testified that the magazine from Sydni Collins' firearm had twelve bullets in it, her finger was not on the trigger, the slide was completely back, and there were no bullets in the barrel. (Trial Tr. pp. 118–22). Eyewitness testimony, namely Coad and Montgomery, testified that Applicant shot first. Additionally, Ronnie Scott—a member of Thunderguard at the time—testified that he saw Johnson and the victims having a short conversation, and then Applicant pulled up in his vehicle, exited the vehicle, and punched Montgomery. (Trial Tr. pp. 234 – 35). Ronnie testified that after Applicant punched Montgomery, he saw a muzzle flash coming toward him. (Trial Tr. p. 235).

Third, Investigator Taima Jordan testified that the witness statements concerning Applicant's involvement and role in the shooting were corroborated by surveillance video. (Trial Tr. p. 439).

Fourth, while Applicant now testifies to his recollection of events on that night, at his sentencing hearing, Applicant told the sentencing court that he was not present at the scene where AC Collins and Sydney Collins were killed. (Sentencing Tr. pp. 14–15). Applicant reiterated to the sentencing court that he was not the person present at the scene of the shootings. (Sentencing Tr. p. 15).

Lastly, in support of his self-defense theory, Applicant merely offered self-serving testimony that was not corroborated by Johnson, the forensic evidence, video, or eyewitnesses. Critically, in his statement to law enforcement after he was read his Miranda rights, Applicant advised law enforcement he had not been in Columbia, South Carolina, at the time of the shooting and did not know anything about the shooting. (Trial Tr. pp. 430–31). Based on the incredible nature of Applicant's testimony, this Court cannot ascertain any semblance of a possibility that the trial court would have granted Applicant's request for a self-defense charge. This is further

supported by the fact that Applicant would not be able to show that he was in a place he was legally allowed to be—outside of his running vehicle at a red light and two lanes over—or that he did not bring on the difficulty when he got out of his car and inserted himself into the situation. Thus, Applicant did not show any prejudice as a result of any deficiency by Trial Counsel.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 1i: Trial Counsel improperly advised Applicant not to testify in his own defense.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for improperly advising Applicant not to testify in his defense. This Court finds this allegation is without merit.

Trial

At trial, the following colloquy occurred between Applicant and the trial court under oath:

THE COURT: All right. Now, Mr. Middleton, at this time I'm going to explain to you the -- explain to you certain of your rights. If you do not understand anything I say, please let me know. If you want me to explain anything in more detail, please let me know. Do you understand so far?

DEFENDANT: Yes.

THE COURT: Now, we have now reached the stage of the trial where you may present your defense. You have the right to claim the protections given to you by the Fifth Amendment to the Constitution of the United States. This amendment states in part: No person shall be compelled in any criminal case to be a witness against himself. This means that you cannot be required to testify in this case. You have the right to testify on your own behalf; however, no one can make you testify. This is a personal right and no one else can waive this right except you. If you decide to testify, you will be subject to the same rules that the -- same rules that govern other witnesses, and you may be examined and cross-examined on any relevant issue in this case. In addition, if you have any convictions involving dishonesty or false statements or for crimes punishable by imprisonment for more than one year, and this court determines that the probative value of admitting the evidence outweighs the prejudicial effect to you, the solicitor will be able to introduce your record to attack your credibility. If you decide to testify, this decision on your part must be freely, voluntarily, knowingly -- freely, voluntarily, and intelligently made with knowledge of the protections given to you by the Fifth Amendment and the consequences of your decision to testify. If you decide not to testify, I will instruct the jurors that they cannot give the fact that you did not testify any consideration whatsoever, and that there is to be absolutely no prejudice to you because you did not testify. It is left entirely up to you whether or not to testify. You may talk with your attorney, your family members, friends, or anyone else, but the final decision would be left entirely up to you. Do you understand what I've explained to you so far?

DEFENDANT: Yes, sir.

THE COURT: Do you have any questions about what I have explained to you?

DEFENDANT: No.

THE COURT: Have you discussed with your lawyer whether you should or should not testify?

DEFENDANT: Yes.

THE COURT: Do you wish to talk to your lawyer any more at this time?

DEFENDANT: Yes, sir.

THE COURT: You do?

DEFENDANT: Yes.

THE COURT: Okay. I'll let you do so. I'll come back and I'll go through it again if I need to, okay?

DEFENDANT: Yes, sir.

THE COURT: Y'all want to go to a conference room, or can you talk right here?
MR. SUTHERLAND: Yeah, we're, we're, we're ---
THE COURT: Okay. We'll just be at ease.
THE COURT: Now, Mr. Middleton, you had an additional opportunity and time to talk to your lawyer about whether or not you should testify. Is that correct?
DEFENDANT: Yes, sir.
THE COURT: Have you had enough time?
DEFENDANT: Yes, sir.
THE COURT: And what is your decision, sir?
DEFENDANT: No, sir.
THE COURT: All right. So, you do not wish to testify?
DEFENDANT: No, sir.
THE COURT: All right. Thank you very much.
DEFENDANT: Thank you.
THE COURT: Anything further on this issue?
MR. SUTHERLAND: No, sir.
THE COURT: That covers everything?
MR. FYALL: Yes, sir.

(Trial Tr. pp. 463-466).

PCR Evidentiary Hearing

On direct examination, Applicant testified that he wanted to testify in his case. (PCR Tr. p. 36). Applicant testified that he and Trial Counsel went back and forth about it to the point where the judge asked them multiple times if they needed a moment. (PCR Tr. pp. 36, 37). Applicant testified that he was very upset with Trial Counsel until this PCR hearing, because he now knew he was not prepared to testify. (PCR Tr. p. 36). Applicant testified that he was not prepared because he did not have time to prepare himself to take the stand. (PCR Tr. p. 36). Applicant testified that in his meetings with Trial Counsel, there was never a serious discussion about him testifying in the trial. (PCR Tr. p. 36). Applicant testified that he told the judge it was his decision not to testify because his attorney told him he was not prepared, and Applicant listened. (PCR Tr. p. 37).

On cross-examination, Trial Counsel testified he did tell Applicant that Applicant would "blow this" if he got up and testified. (PCR Tr. p. 63). Trial Counsel testified that he did not prepare Applicant to testify, because Applicant told him he was not present. (PCR Tr. p. 82). Trial Counsel testified that "everything is my guys decision." (PCR Tr. p. 82). Trial Counsel testified that during trial, Applicant advised him that he wanted to testify to contradict inconsistencies in the State's case, specifically, where his gun was found. (PCR Tr. p. 83). Trial Counsel testified that they did not discuss testifying because Applicant was not there and his testimony would not have added anything. (PCR Tr. p. 84).

Findings

This Court finds the combination of the record and testimony provided at the evidentiary hearings that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." *Ard v. Catoe, supra*. This Court additionally finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Trial Counsel and Applicant both testified that there was never any serious discussion between them about Applicant testifying in his own defense. As found *supra*, Applicant's contention that he advised Trial Counsel that he acted in self-defense is **not credible**. Trial Counsel **credibly** testified that a claim of self-defense would not have helped him, considering that the defense was that he was not present and misidentification. Additionally, Trial Counsel **credibly** testified that it was Applicant's decision whether to testify or not. Therefore, Trial Counsel is not deficient for failing to prepare Applicant to testify that he acted in self-defense, where Applicant never advised Trial Counsel of his present version of events. Additionally, Applicant was advised of his right to

testify, was given an opportunity to elect to testify, and knowingly and intelligently opted not to do so. (Trial Tr. pp. 463–466)

Moreover, Applicant failed to show the outcome of his trial would have been different had he testified. As found *supra* in **Allegation 1h**, Applicant's version of events, which he presented at the PCR evidentiary hearing, is **not credible** considering all the evidence. Therefore, it is highly unlikely that had Applicant testified, the outcome of his proceeding would have been different. See Foye v. State, 335 S.C. 586, 592, 518 S.E.2d 265, 268–69 (1999) (affirming the PCR judge's finding that the outcome of petitioner's trial would not have been different because the jury likely would not have found petitioner credible).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

- Allegation 1j:** Trial Counsel failed to object to the improper testimony of Taima Jordan when the witness testified statements given by the witnesses were consistent with the video.
- Allegation 1k:** Taima Jordan was permitted to testify during cross-examination as to his opinion of motorcycle club culture when he had not been qualified as an expert.

Applicant alleges that Trial Counsel's representation was constitutionally ineffective for failing to object to opinion testimony from Investigator Taima Jordan (Investigator Jordan).

Specifically, Applicant avers Trial Counsel was ineffective for failing to object to Investigator Jordan's testimony about Applicant's behavior in the video footage and his opinion about motorcycle club culture. This Court finds this allegation to be without merit.

"If the witness is not testifying as an expert, the witness' testimony in the form of opinions or influences is limited to those opinions or influences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training." Rule 701, SCRE. A lay witness's testimony based on perceptions and interactions, as it does not require specialized knowledge, skill, experience, or training. See Huffman v. Sunshine Recycling, LLC, 426 S.C. 262, 826 S.E.2d 609 (2019) (Officer's testimony regarding employee's communications with law enforcement concerning his sense of urgency about a criminal investigation into stolen property from the electric utility company, could not be excluded on basis it constituted expert testimony, as the testimony was based on officer's perceptions of their interactions with employee, and did not require special knowledge, skill, experience, or training.).

Trial

At trial, Investigator Jordan testified as follows regarding her investigation of the shooting:

- Q. I want to back up just a little bit as well. On the 20 -- going back to late July, did you attend Thunderguard event?
- A. Yes. So, the same weekend as this incident that happened, the Thunderguard had an anniversary party in Richland County. So, being as I was assigned to the Gang Unit, myself and several other investigators attended that party in a covert manner, meaning that we were not to be seen, but we let the road units know that we were in the area and that if anything happened, that we would call to let, let them know. It was mainly for protection of them, to make sure that there were no -- there was no retaliation in regards to what had happened since they had been deemed suspects in the, in the case.

(Trial Tr. p. 425)

- Q. You came in and talked to Mr. Scott, and you got a statement from him?
- A. Yes.
- Q. Correct? And initially what did he, he tell you?
- A. That he was on the way to work in Lumberton, North Carolina, and that he was going to see a female friend before he, before he went to North Carolina. Then that he got behind some of his brothers, being that he was part of Thunderguard. And then a shooting took place, but he didn't see anything but he heard the gunshots.
- Q. All right. After he told you he didn't see anything, what did you tell him?
- A. We try to explain to victims and witnesses that -- and especially with Mr., Mr. Scott, we knew the One Percent biker culture. They do not like to talk to the police. It's kind of frowned upon to talk to the police. We knew that he may have been afraid and scared and didn't want to give up his brothers. But during that time, he told us it was not worth his, his freedom or his job, and that's when he told us that he saw Mr. Tiptoe fire.
- Q. You talk about One Percent biker culture, to not -- you said it's not common for them to talk to police. Even more so, is it common for them to show up to court and testify?
- A. Correct.

(Trial Tr. pp. 426-27).

PCR Evidentiary Hearing

On direct examination, Applicant testified that Investigator Jordan testified in the case about motorcycle club culture, and that no objection was made. (PCR Tr. p. 41).

On cross-examination, Trial Counsel testified that Investigator Jordan testified about motorcycle club culture and "not talking to the cops." (PCR Tr. p. 77). Trial Counsel testified that when witnesses changed their stories or wanted to explain inconsistent statements, they would fall back on the "One Percent," not talking to the cops. (PCR Tr. p. 78). Trial Counsel testified that his view was that Investigator Jordan could talk about it because it had already been testified to by Montgomery. (PCR Tr. pp. 77-78). Trial Counsel testified that Investigator Jordan gave an opinion about what members of those motorcycle clubs do, but he did not object because he did not "want to look like a jerk." (PCR Tr. pp. 78-79). Trial Counsel testified that he probably should have cut him off earlier. (PCR Tr. p. 79).

During redirect examination, Trial Counsel testified that if someone is not an expert and they are providing opinion testimony, you should ask for a mistrial; otherwise, you should obtain a curative instruction. (PCR Tr. p. 87). Trial Counsel agreed it was possible to have someone qualified as an expert, and testified that "[Investigator Jordan's] been doing this stuff." (PCR Tr. p. 88). Trial Counsel testified again that his view was "this is the elephant in the room, so I'm just gonna talk about it," although he testified that it was probably a mistake in retrospect. (PCR Tr. pp. 87–88).

On direct examination, Solicitor Fyall testified Investigator Jordan was not qualified as an expert because he was testifying about why he took specific actions based on his general knowledge, like the idea that "gangs generally don't like to cooperate with the police." (PCR Tr. pp. 92–93). Solicitor Fyall testified that in his mind, that's not testimony that would require Investigator Jordan to be qualified as an expert. (PCR Tr. p. 93).

During cross-examination, Solicitor Fyall testified that Investigator Jordan had testified to Applicant's behavior in the video footage. (PCR Tr. p. 99). Solicitor Fyall testified that Investigator Jordan was not at the scene; however, his testimony was a reasonable conclusion based on the video. (PCR Tr. p. 99).

Findings

This Court finds Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." *Ard v. Catoe, supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814. This Court finds Trial Counsel **credibly** testified that he strategically chose not to object because

of how it would look to the jury, and because he wanted to address the fact that witnesses were using the "gang" excuse to change their testimony. Trial Counsel credibly testified that he believed Investigator Jordan could testify to gang knowledge, as Montgomery had already testified to the same, and several witnesses referred to the "One Percent" club. Further, this Court finds the testimony would have otherwise been admissible under SCRE Rule 701, as Investigator Jordan testified to his personal knowledge of "One Percent biker culture" and how his investigation progressed. Investigator Jordan's testimony did not stray into the realm of expert testimony, and therefore, it was permissible lay witness opinion testimony.

Additionally, Investigator Jordan's testimony concerning Applicant's behavior observed in the video is permissible testimony. See State v. Pickrell, 435 S.C. 417, 867 S.E.2d 465 (Ct. App. 2021), aff'd as modified, 443 S.C. 497, 905 S.E.2d 374 (2024) (Investigator's testimony in murder trial regarding interview with defendant about why she shot victim was not improper lay testimony, as investigator conveyed perceptions about what the defendant was conveying took place.); United States v. Dorsey, 122 F.4th 850 (9th Cir. 2024) (Detective's testimony about details in surveillance video was admissible lay opinion, as he provide narrative testimony based on his extensive out-of-court review of surveillance video, which allowed him to highlight details that the jury would have otherwise missed). Based on this, there was no legally objectionable basis for Trial Counsel to object to this testimony. See Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient ~~evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render~~

reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

NEWLY DISCOVERED EVIDENCE ALLEGATIONS

Allegation 2(a): **The now-available testimony of Marquez Johnson, the former co-defendant, would have overcome the circumstantial evidence against Applicant.**

Applicant alleges that the now available testimony of his co-defendant Johnson constitutes newly-discovered evidence and is a sufficient basis for granting a new trial. This Court finds this allegation to be without merit.

Under the Uniform Post-Conviction Procedure Act, a person may institute a PCR action "if there exists evidence or material facts not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of a material fact not previously presented, under the discovery rule, the PCR application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C).

A party requesting a new trial based on newly discovered evidence must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;

- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

Clark v. State, 315 S.C. 385, 387–88, 434 S.E.2d 266, 267 (1993); see Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (setting forth the five factors to be analyzed when considering a newly-discovered evidence claim) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979)). However, the granting of a new trial based on after-discovered evidence is disfavored. State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011); see also State v. David, 14 S.C. 428, 432 (1881) ("There can be no doubt that motions of this sort should be received with the utmost caution, because, as it is said by a learned judge, there are but few cases tried in which something new may not be hunted up . . .").

PCR Evidentiary Hearing

See Allegation 1h, PCR Evidentiary Hearing section, *supra*, for summary of Johnson's testimony.

Findings

This Court finds that the testimony of Johnson does not meet the five Clark factors to constitute newly discovered evidence. First, the order granting Johnson immunity from prosecution was filed December 19, 2019. Applicant filed his PCR application alleging newly discovered evidence on April 16, 2021. Johnson's testimony could have been discovered through reasonable diligence in December 2019, requiring Applicant to raise this allegation on or before December 2020. However, assuming *arguendo* that Applicant had timely raised this allegation, Johnson's testimony is merely cumulative and not material to Applicant's guilt or innocence. Johnson testified to the same version of events presented at Applicant's trial, but from his

perspective. Relevantly, Johnson testified that he ducked his head before shots were fired, and he only lifted his head after the shots were fired, and Sydni Collins was dead on the ground.

Applicant's assertion that because Johnson was acquitted, he should now be acquitted disregards the facts and circumstances of the shooting. Johnson's testimony was corroborated by video, showing AC Collins lunging at him after various shots were fired, and testimony was presented that AC Collins had threatened Johnson's life just before the shooting. Applicant shot and killed Sydni Collins after shooting her in the chest and then in the face when she was on the ground. Johnson's testimony does not establish that Applicant acted in self-defense or in defense of others. Nevertheless, this Court finds Johnson's testimony is not helpful or useful where Applicant was found not guilty of the killing of AC Collins.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove Clark factors one, three, four, and five. See, e.g., United States v. Connolly, 504 F.3d 206, 212 (1st Cir. 2007) ("Every element of this test . . . is essential, and a failure to establish any one element will defeat the motion.") Accordingly, this allegation must be **DENIED** and **DISMISSED**.

[CONCLUSION PAGE FOLLOWS]

CONCLUSION


Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be **DENIED and DISMISSED WITH PREJUDICE.**

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry to judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 15th day of July, 2025.


WILLIAM A. MCKINNON 2761
Presiding Judge
Fifth Judicial Circuit

Richland, South Carolina